Perbadanan Pengurusan Endah Parade v Magnificient Diagraph Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1549–07 OF 2012
MOHD HISHAMUDIN, ABDUL AZIZ ABD RAHIM AND MOHAMAD ARIFF JJCA
13 MAY 2013

Land Law — Strata title — Management corporation — Charges imposed by management corporation on unit owner — Whether management corporation empowered to levy charges — Whether charges had been properly decided by unit holders in general meeting — Whether High Court judge erred in holding that there could only be one fund and one payment — Whether decision on rate of contribution to be made to special account was in breach of Act — Strata Titles Act 1985 ss 41, 45 & 46

The dispute between the appellant, the management corporation for a commercial complex known as Endah Parade, and the respondent, the proprietor of two strata title parcels within the complex ('the two units'), revolved around the legality of certain charges imposed by the appellant on the respondent. In its writ action the appellant contended that it was empowered by the Strata Titles Act 1985 ('the Act') to levy charges in the sum of RM439,014.96 and RM5,857.64 in respect of the two units. The respondent disputed the legality of some of these charges and claimed having paid the service charges levied against it. The High Court judge ruled that s 41(3), (5)(b) and (ba) of the Act only allowed the appellant management corporation to levy one payment or contribution from unit owners ie a contribution to the management fund and out of that payment a portion would be contributed to the special account. Further, it was found that the rate of contribution to be made to the special account from the management fund was determined in contravention of the Act, in that it was not determined at the general meeting of the appellant management corporation. As such, the High Court judge disallowed the appellant's claim for the majority of the charges but allowed its claim for signage charges, electricity charges for extended business hours and service charges for the two units, which amounted to RM48,781.44. This was the appellant's appeal and the respondent's cross-appeal against that decision. The appellant submitted that the High Court judge had erred in making it a requirement that there can only be one fund and one payment. The appellant drew a distinction between administration expenses and consumption-based expenses, which were covered specifically by s 43 of the Act. It was the appellant's contention that these consumption-based expenses should be properly covered under the by-laws of the management corporation and that

this was the statutory source for these items of expenditure and their recoverability from the unit owners. The respondent challenged the High Court's award on the grounds that the appellant had failed to discharge its burden of proof to support its claim for RM48,781.44. The respondent claimed that it had settled these claims in full and that the appellant had not proven these claims for overdue payments. The respondent also submitted that the appellant had acted in breach of the sale and purchase agreement, which had provided that the respondent had a right to free signage.

Held, dismissing the appeal and cross-appeal with costs of RM30,000 and RM10,000 respectively:

(1) The conclusion reached by the High Court judge accorded with the wording of the Act and the presumed collective intention and wisdom of Parliament. Within the context of the Act, in reading s 45 of the Act in conjunction with s 46 of the Act, the expenses incurred or to be incurred by the management corporation could include not only administrative expenses but also expenses related to the maintenance of the building. The expenses referred to in s 45 of the Act include the payment of 'premiums of insurance' and other payments in connection with 'discharging any other obligation of the management corporation'. However, in fixing the contribution to be paid by each unit owner, the management corporation should budget for its approval at the general meeting. The issue of proper authority to impose a levy was too important to be left to the management corporation or the council to decide as a matter of discretion. The same reasoning applied in relation to the sinking fund (see paras 27, 34 & 36).

(2) The appellant's argument that cl 4C of the Deed of Mutual Covenants empowered it to impose charges and claim to recover the consumption expenses that it had paid on behalf of the unit holders could not stand in the face of clear statutory provisions in the Act. The clauses could not override the main provisions in ss 45 and 41 of the Act (see para 37).

(3) Although the respondent argued that there had been an agreement to allow free signage use in the sale and purchase agreement, the facts showed that the respondent had in fact been charged signage charges previously. As such, the trial judge's assessment and finding that the claim for the unpaid signage charges should be allowed was adopted (see para 39).

[Bahasa Malaysia summary

Pertikaian antara perayu, perbadanan pengurusan untuk sebuah kompleks komersial dikenali sebagai Endah Parade, dan responden, tuan punya dua hak milik strata dalam kompleks tersebut ('dua unit tersebut'), berkisarkan kesahan caj-caj tertentu yang dikenakan oleh perayu ke atas responden. Dalam

tindakan writnya perayu menegaskan bahawa ia diberi kuasa di bawah Akta Hak Milik Strata 1985 ('Akta tersebut') untuk mengenakan caj-caj levi berjumlah RM439,014.96 dan RM5,857.64 ke atas dua unit tersebut. Responden mempertikaikan kesahan beberapa caj tersebut dan mendakwa telah membayar caj-caj servis yang dikenakan levi terhadapnya. Hakim Mahkamah Tinggi memutuskan bahawa s 41(3), (5)(b) dan (ba) Akta tersebut hanya membenarkan perayu perbadanan pengurusan untuk mengenakan levis satu bayaran atau sumbangan daripada pemilik unit, iaitu satu sumbangan kepada dana pengurusan dan daripada bayaran tersebut sebahagian daripadanya akan disumbangkan kepada akaun khas. Selanjutnya, adalah didapati bahawa kadar sumbangan yang perlu dibuat kepada akaun khas daripada dana pengurusan ditentukan bertentangan dengan Akta tersebut, di mana ia bukan ditentukan di mesyuarat agung perbadanan pengurusan perayu. Oleh itu, hakim Mahkamah Tinggi tidak membenarkan tuntutan perayu untuk sebahagian besar caj-caj tersebut tetapi membenarkan tuntutannya untuk caj-caj papan tanda, caj-caj elektrik untuk waktu perniagaan lebih masa dan caj-caj perkhidmatan untuk dua unit tersebut, yang berjumlah RM48,781.44. Ini adalah rayuan perayu dan rayuan balas responden terhadap keputusan tersebut. Perayu berhujah bahawa hakim Mahkamah Tinggi terkhilaf dalam menjadikannya satu keperluan yang mana hanya boleh terdapat satu dana sahaja dan satu bayaran. Perayu membuat perbezaan antara perbelanjaan pentadbiran dan perbelanjaan berdasarkan kegunaan, yang dinyatakan secara spesifik dalam s 43 Akta tersebut. Adalah hujah perayu bahawa perbelanjaan berdasarkan kegunaan wajar dinyatakan di bawah undang-undang kecil perbadanan pengurusan tersebut dan bahawa ini adalah sumber statutori untuk item-item perbelanjaan dan cara mereka mendapat balik daripada pemilik-pemilik unit tersebut. Responden mencabar award Mahkamah Tinggi atas alasan bahawa perayu telah gagal melepaskan beban buktinya untuk menyokong tuntutannya berjumlah RM48,781.44. Responden mendakwa bahawa ia telah menjelaskan tuntutan-tuntutan tersebut sepenuhnya dan bahawa perayu tidak membuktikan tuntutan-tuntutan tersebut untuk bayaran tertunggak. Responden juga berhujah bahawa perayu telah bertindak melanggar perjanjian jual beli, yang memperuntukkan bahawa responden mempunyai hak mendapat papan tanda percuma.

Diputuskan, menolak rayuan dan rayuan balas dengan kos masing-masing berjumlah RM30,000 dan RM10,000:

(1) Kesimpulan yang dibuat oleh hakim Mahkamah Tinggi adalah menurut peruntukan Akta tersebut dan andaian niat kolektif dan kearifan Parlimen. Dalam konteks Akta tersebut, s 45 Akta tersebut dibaca bersama s 46 Akta tersebut, perbelanjaan yang terakru atau akan terakru oleh perbadanan pengurusan boleh melihatkan bukan sahaja perbelanjaan pentadbiran tetapi juga perbelanjaan berkaitan

penyelenggaraan bangunan. Perbelanjaan-perbelanjaan yang dirujuk dalam s 45 Akta tersebut termasuklah bayaran 'premiums of insurance' dan bayaran lain berkaitan dengan 'discharging any other obligation of the management corporation'. Walau bagaimanapun, dalam menetapkan sumbangan yang perlu dibayar oleh setiap pemilik unit, perbadanan pengurusan tersebut patut membuat anggaran untuk diluluskan dalam mesyuarat agung. Isu tentang kuasa wajar untuk mengenakan levi juga penting untuk diputuskan oleh perbadanan pengurusan atau majlis itu menurut budi bicara. Alasan sama terpakai berkaitan dana terikat (lihat perenggan 27, 34 & 36).

(2) Hujah perayu bahawa fasal 4C Surat Ikatan Perjanjian Bersama memberi kuasa kepadanya untuk mengenakan caj-caj dan tuntutan untuk mendapat balik perbelanjaan yang digunakan yang telah dibayarnya bagi pihak pemegang-pemegang unit tersebut tidak boleh kekal berdasarkan peruntukan-peruntukan statutori yang jelas dalam Akta tersebut. Fasal-fasal itu tidak boleh mengatasi peruntukan-peruntukan utama dalam ss 45 dan 41 Akta tersebut (lihat perenggan 37).

(3) Walaupun responden berhujah bahawa terdapat perjanjian untuk membenarkan penggunaan papan tanda percuma dalam perjanjian jual beli itu, fakta menunjukkan bahawa responden sebenarnya dikenakan caj untuk papan tanda sebelum itu. Oleh itu, penilaian dan penemuan hakim perbicaraan untuk caj papan tanda yang tidak berbayar patut dibenarkan adalah terpakai (lihat perenggan 39).]

Notes

For cases on management corporation, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5280–5302.

Cases referred to

Lai King Lung v Perbadanan Pengurusan Anjung Hijau & Anor [2012] 7 MLJ 680; [2012] 1 CLJ 1013, HC (refd)

Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd [2002] 2 SLR 1, CA (refd)

Owners SP 69352, The v Vero Insurance Ltd (Home Building) [2009] NSWCTTT 396 (refd)

Paganetto v Management Corp Strata Title No 1075 [1988] 1 SLR 268, HC (refd)

Palm Oil Research and Development Board & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 17A

Land Titles (Strata) Act (Cap 158) [SG] ss 42, 48

Strata Schemes (Freehold Development) Act 1973 [AU] s 18

Strata Titles Act 1985 ss 36, 36(c), 39(1), (2A), (4), 41, 41(3), (5), (5)(b), (ba), (d), 43, 43(1), 1(a), (b), (2)(f), (4), (5), 44(1), (2), (3), 45, 45(1), 46, Second Schedule, Third Schedule

Appeal from: Suit No 22NCVC-790 of 2011 (High Court, Kuala Lumpur)

MS Murthi (Eolanda Yeo with him) (Cheang & Ariff) for the appellant.
Elaine Yap (Azmimi Pharmy with her) (Wong & Partners) for the respondent.

Mohamad Ariff JCA:

[1] Two appeals were before this court initially. Appeal No W-02-(NCVC)(W)-1549–07 of 2012 is an action commenced by writ of summons, while Appeal No W-02-(NCVC)-1597–07 of 2012 is an originating summons action. We recorded an order by consent of the parties to remit the originating summons action back to the High Court for retrial since we were of the opinion that this particular action had been dismissed without a proper hearing on the merits and thereby resulted in a mistrial. Thus, presently we are concerned only with the appeal in the writ action.

[2] The subject matter of this appeal concerns an interpretation of some important provisions in the Strata Titles Act 1985 ('STA'), a piece of legislation which has been argued before our courts in some detail only fairly recently with the setting up and the starting of operation of management corporations in subdivided buildings under the STA. Both parties have requested this court to reserve our judgment and to deliberate and consider the issues before this court in this appeal with a view to providing some guidance on the law since, we are informed, these issues have raised uncertainties and concerns among proprietors or unit holders subdivided parcels and management corporations. In view of the topicality and importance of the issues raised, we agreed with the sentiment expressed by counsel. We now provide our decision and the supporting grounds.

[3] We proceed first and foremost with the salient background facts.

THE FACTS

[4] The appellant, Perbadanan Pengurusan Endah Parade ('management corporation'), is the management corporation for a commercial complex known as Endah Parade. It is common ground that the appellant management corporation was formed under the Strata Titles Act 1985 on 5 April 2007. It held its first annual general meeting on 19 April 2010 some three years later, and its second annual general meeting on 7 July 2011. The appellant was the plaintiff in the writ action filed in 2011. The respondent, Magnificient

Diagraph Sdn Bhd, and the defendant in the court below, is the proprietor of two strata title parcels within the complex. These are identified as Lot LG-001 and Lot New Office. As at 19 April 2010, ie the date of the first general meeting of the management corporation, there were a total of 271 registered proprietors of the building, and altogether there were and are 469 units of varying sizes. In terms of 'share units', the total share units for the two lots owned by the respondent come to 65,636 share units, which comprise 26% of the total share units for the complex. The respondent operates the Carrefour Supermarket from these parcels. The dispute between the parties, to put in a nutshell, revolves around the legality of certain charges imposed by the appellant management corporation on the respondent. The management corporation maintains it is empowered by the STA to levy these charges; the respondent on the other hand disputes the legality of some of the charges, whilst maintaining in respect of the charges it agrees as legitimately levied ie the service charges, that it has paid them on the evidence adduced. What are these charges in contention between the parties? We start with the appellants' case as pleaded.

THE PLEADED CLAIM

[5] The charges claimed by the respondent as pleaded in its amended statement of claim is for the period between 5 April 2007 and 18 August 2011. As indicated earlier, 5 April 2007 is the date when the management corporation was incorporated. The following constitute the accrued charges for the respective lots:

(1)	Lot LG-001		
	Details of charges	Amount	Accrued interest
(a)	Signage Charges	RM4,000	RM622.77
(b)	Administrative charges for water meter reading	RM275	RM--
(c)	Electricity charges for extended hours	RM3,280	RM1,820.74
(d)	Fire insurance	RM73,002.22	RM11,973.38
(e)	Legal fees	RM210	---
(f)	Cleaning charges for cleaning of water and oil	RM300	RM22.60
(g)	Quit rent	RM3,469.76	
(h)	Sinking fund	RM45,676.50	RM740.83
(i)	Services charges	RM36,377.44	RM11,929.76
(j)	Sewerage charges (fixed)	RM139,480.12	RM29,796.43
(k)	Sewerage charges (consumption)	RM55,836.07	RM13,026.19

(l)	Water charges	RM6,709.16	RM46,599

TOTAL:RM439,014.96

(2) Lot New Office

Details of charges	Amount	Accrued interest
Fire insurance	RM77.55	RM2.68
Quit rent	———	RM0.69
Sinking fund	RM274.50	RM4.45
Service charges	RM5,124	RM283.07
Sewerage charges (fixed)	RM5,562.01	RM295.63

TOTAL: RM5,857.64

THE HIGH COURT DECISION

[6] The learned High Court judge disallowed the claim after a full trial for the majority of the charges claimed, and merely recorded judgment for the signage charges, electricity charges for extended business hours and the service charges for the respective two units. The accrued interest for these charges was not allowed. The following is recorded in the judgment of the High Court:

> Defendan yang tersebut di atas hendaklah membayar plaintif bagi jumlah RM48,781.44 (butir-butir seperti disenaraikan di bawah) berserta faedah pada kadar 4% setahun mulai 19 Ogos 2011 sehingga penyelesaian sepenuhnya,

Butir caj	Amaun caj (RM)
Papan iklan	4,000
Caj elektrik bagi masa perniagaan yang lanjutan	3,280
Caj perkhidmatan (LG-001)	36,377.44
Caj Perkhidmatan (New Office)	5,124
Jumlah	48,781.44

[7] It is apparent from the order of the High Court that the claims for items such as sewerage charges, sinking fund and fire insurance charges, which are sizeable in amounts, were dismissed. The main underlying reason for the High Court's decision rests on a reading of s 41(3), (5)(b) and (ba) of the STA which

led the learned High Court judge to conclude that these provisions afford 'the only power that can be used to levy funds from unit owners'. It will be useful for a fuller appreciation of the present dispute to consider the relevant provisions of s 41 in totality, and we quote them below:

> 41 Duty of original proprietor to convene 1st Annual General Meeting.
>
> (1) It shall be the duty of the original proprietor to convene the first annual general meeting of the management corporation within one month after the expiration of the initial period.
>
> (2) If the original proprietor fails to comply with subsection (1), he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding twenty-five thousand ringgit and to a further fine not exceeding two thousand ringgit for each day the offence continues to be committed.
>
> (3) Without prejudice to the provisions of subsections (1) and (2), if the original proprietor fails to convene the first annual general meeting within the specified period, the Commissioner may, on application by the purchasers, the proprietor or chargee of a parcel, appoint a person to convene the first annual general meeting of the management corporation within such time as may be specified by the Commissioner.
>
> (4) The original proprietor shall give a written notice of the first annual general meeting to all parcel proprietors constituting the management corporation not less than fourteen days before the meeting.
>
> (5) The agenda for the first annual general meeting shall include the following matters:
>
> (a) to decide whether to confirm, vary or extend insurances effected by the management corporation;
>
> (b) to decide whether to confirm or vary any amounts determined as contributions to the management;
>
> (ba) to determine the portion of contribution to the management fund to be paid into the special account to be maintained under section 46;
>
> (c) to determine the number of members of the council and to elect the council where there are more than three proprietors;
>
> (d) to decide whether to amend additional by-laws in force immediately before the holding of the meeting; and
>
> (e) to present the audited accounts of the management corporation.

[8] As can be seen from the heading of s 41, the provision concerns the duty of the original proprietor to convene the first annual general meeting of the management corporation, and by sub-s (5) the agenda for the first annual general meeting has to include, inter alia, 'to confirm or vary' any amounts 'determined as contributions to the management fund', and to determine the 'portion of contribution' of the management fund to be paid into the 'special

account' to be maintained under s 46. Starting from this premise, the learned High Court judge arrived at the conclusion mentioned earlier that this statutory power is the only power that can be used to levy funds from unit holders. The learned High Court judge stated:

> The management fund is to cater for all these expenses and if it is found that the management fund contributions are insufficient to cater for all these expenses than the plaintiff will have to go back to the general meeting to increase the rate of contributions to the management fund. The plaintiff cannot levy the defendant for all these charges separately, but he will have to be covered by the Management Fund and any attempt to levy these charges directly from the defendant is void ab initio as it is ultra vires the Strata Titles Act 1985 …

[9] In short, the management corporation cannot levy separate items as charges, but must limit itself to charging only the 'contributions to the management fund' under sub-s (5)(b) and (ba). The learned High Court judge further relies on the judgment of the Singapore Court of Appeal in the case of *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1, and the commentary by Prof Teo Keang Sood in *Strata Title in Singapore & Malaysia* (3rd Ed).

[10] In the aforesaid Singapore Court of Appeal case, the court authoritatively declared that the power of the management corporation to raise contributions is 'clearly and exhaustively provided for in s 42 of the LTSA' (Land Titles (Strata) Act (Cap 158, 1999 Ed)), and that 'anything done outside its powers is void ab initio'. As for the commentary by Prof Teo, the learned High Court judge relies on the following passage:

> Under the STA, the Management Corporation is also required to establish a Management Fund sufficient in his opinion to meet the administrative expenses as may be incurred for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance and discharging any of its other obligations. For the purpose of establishing and maintaining the Management Fund, the Management Corporation may at a General Meeting determine from time to time the amount to be raised for the purposes mentioned …
>
> Generally, payment is made from this fund for recurring maintenance expenditure, such as swimming pool maintenance and lawn-mowing services, as well as the meeting of the recurrent expenses like insurance, water and electricity charges, security guards services and salaries of fees for the keeping of accounts and records such as the strata roll, and the conduct of general meetings and meetings of the Council of the Management Corporation or Executive Committee of the subsidiary Management Corporation.

[11] Proceeding on this basis, the learned High Court judge disallowed the claims by the plaintiff which extend beyond the 'service charges', since all such

expenses 'must be paid for from the Management Fund as provided in the said Act'. The claims relating to 'sinking fund' and 'fire insurance' were singled out for special mention. The plaintiff's attempt to levy a sum over and above the service charges was deemed void ab initio and in contravention of s 41(5)(ba) since the said provision merely allows the levying of one payment and out of that payment a portion would be contributed to the 'special account'. Further, the rate of contribution to be made to the special account from the management fund was not determined at the general meeting of the Management Corporation, but by the Council of the management corporation in contravention of the Act. The learned High Court judge added:

> Management Corporations like the plaintiff must be reminded that they can only levy one payment from unit owner ie a contribution to the Management Fund and from that sum contribution to the special account … is to be approved at general meeting and nothing else.

[12] The learned High Court judge noted from the evidence that the general meeting had resolved that the rate of contribution to the management fund/service charge was to be calculated according to the share units, and it was agreed with regard to the sinking fund that the rate of contribution to the sinking fund proposed at 15% of the management charges was 'hereby varied and is to be reviewed by the Council of the Management Corporation'.

[13] As for the fire insurance charges, reference was made to s 43(1)(b) and (f) and that these provisions imposed a 'statutory duty' on the plaintiff to insure the subdivided building and to pay premiums on any insurance effected on it from the Management Fund. Section 43(1)(b) and (f) reads:

> 43 Duties and Powers of Management Corporation
>
> (1) The duties of the management corporation include the following:
>
> (b) to insure and keep insured subdivided building on land to the replacement value thereof against fire and such other risk as may be prescribed under this Act; …
>
> (f) to pay premiums on any insurance effected by it …

[14] The High Court allowed merely the claim for service charges plus the claims for signage charges and electricity charges for the extended period. It does not appear too clearly on the face of the written grounds of judgment on what basis the latter two claims were allowed, but it would appear from the submission by the appellant/plaintiff that these two charges rested on a contractual arrangement between the parties, and in the absence of a clear and definite ruling on this point in the judgment of the learned High Court judge we can only assume that this must have been the basis for the decision of the

High Court to allow the claims for signage charges and electricity charges for extended business hours. This position is not seriously challenged by the respondent.

APPEAL AND CROSS-APPEAL

The appeal

[15] The appellant management corporation now appeals against the decision of the High Court, and proceeds on the main ground that the learned High Court judge erred in making it a requirement that there can only be one fund and one payment. This main ground is apparent from para 4 of the memorandum of appeal, reading:

> The learned Judge erred in law when his lordship ruled that the Management Fund as a single account, when by operation of section 45 of the Strata Titles Act 1985, it is a Composite Fund constituted by individual accounts such as rent, rates, premium for insurance, common property maintenance accounts and other obligations of the Management Corporation.

The cross-appeal

[16] The respondent has cross-appealed against the decision of the High Court to allow the claim for the RM48,781.44 and interest thereon at 4%pa from 19 August 2011 until full satisfaction. It is therefore challenging the entire award of the High Court in relation to the signage charges, the electricity charges for extended business hours as well as service charges for both parcel LG-001 and parcel (New Office). In respect of the service charges and the electricity charges for extended hours, it maintains that these charges have been settled in full and therefore there is no evidence to support these claims for overdue payments. It is alleged that the appellant has failed to discharge its burden of proof to support these claims. As regards the signage charges, the respondent claims that the appellant, being the successor in title and the permitted assignee from the developers (Alpha-Lab Sdn Bhd and Soon Teik Development Sdn Bhd), it is therefore bound by the sale and purchase agreement under which the developers had acknowledged that the respondent had a right to free signage, and further there is no agreement between the appellant and the respondent to allow the imposition of signage charges. It is further submitted that the unilateral imposition of the signage charges is in breach of the law and a breach of the sale and purchase agreement between the respondent and the developers.

[17] In the course of submission before us it has been established that three items are no longer in issue, namely 'cukai tanah', 'caj air' and cleaning charges.

These have been established as paid. Dato' SM Murthi, counsel for the appellant has also conceded that the imposition of interest on late contributions does not have a proper mandate from unit holders in general meeting, and to this extend counsel concedes this too is no longer in issue. What remains in dispute are service charges, fire insurance charges, electricity charges for extended business hours, sewerage charges, signage charges, water meter reading charges, legal fees and sinking fund contribution. Two of these charges are significantly minute — RM275 for water meter reading and RM210 for legal charges.

THE APPELLANT'S SUBMISSION

[18] Disputing the decision of the learned trial judge not to allow the other charges apart from service charges, electricity charges for extended business hours and signage charges, the appellant has attempted to draw a distinction between 'administrative expenses' in respect of common property (covered by s 45 of the STA), 'consumption-based expenditures' (such as sewerage charges) and insurance premiums (covered specifically by s 43 of the STA). The expenditures subsumed under s 45 are all related to those incurred in respect of 'common property' in the complex. The consumption-based expenses however should be properly covered under the by-laws of the management corporation, and this is the statutory source for these items of expenditure, not s 45. It was impressed upon us that s 41(5)(d) of the STA allows the management corporation 'to decide whether to amend the additional by-laws in force before the holding of the meeting' (ie by definition, the first annual general meeting of the management corporation). By statutory force, the by-laws in force upon incorporation of the management corporation shall be the by-laws 'set out in the Third Schedule of the Act' (s 44(1) of the STA), but the management corporation 'may by special resolution make additional by-laws, or make amendments to such additional by-laws, not inconsistent with the by-laws set out in the Third Schedule, for regulating the control, management, administration, use and enjoyment of the sub-divided building …' (sub-s (2) of s 44). It is argued that the management corporation has acted under this statutory provision and has confirmed the deed of mutual covenants to the sale and purchase agreement signed by the purchasers with the developer as additional by-laws. This is shown in vol 2(2) of the appeal record, p 630, which contains the following approved resolution of the management corporation:

> AGREED THAT THE BY-LAWS AS SET OUT IN THE DEED OF MUTUAL COVENANT BE ADOPTED AS THE ADDITIONAL BY-LAWS FOR THE CORPORATION/OWNERS

[19] Clause 4C of the deed of mutual covenants which empowers the management corporation to impose 'all other charges which are properly

chargeable' is highlighted. According to counsel for the appellant, the appellant is merely claiming to recover these consumption expenses that it has paid on behalf of the unit holders. Furthermore, the appellant has obtained the necessary approvals from the unit holders at general meeting. The minutes of the first general meeting testify to this.

[20] The first agenda itself is on payment of the several insurance premiums, inclusive of the premium for fire insurance. The following is recorded:

> AGREED THE EXISTING INSURANCES EFFECTED BY THE MANAGEMENT COMPANY HEREBY CONFIRMED ADOPTED

The minutes record that this resolution was passed by a vote of 87/90.

As for the sinking fund, the relevant resolution passed read:

> AGREED THAT THE RATE OF CONTRIBUTION TO THE SINKING FUND (PROPOSED AT 15% OF THE MANAGEMENT/SERVICE CHARGES) IS HEREBY VARIED AND IS TO BE REVIEWED BY THE COUNCIL OF MANAGEMENT CORPORATION

The resolution as regards the contribution to the Management Fund was carried by a majority of 81/90 and is recorded as follows:

> AGREED THAT THE RATE OF CONTRIBUTION TO THE MANAGEMENT FUND/SERVICE CHARGES (CALCULATED ACCORDING TO THE SHARED UNITS) AS PRESENTED IS HEREBY CONFIRMED ADOPTED.

[21] Thus, it is argued for the appellant that the necessary approvals at general meeting have been obtained, and these approvals are consistent with the statutory provisions and the additional by-laws. Recourse is also placed on s 43(1)(f) of the STA, namely the management corporation is empowered 'to do all things necessary for the performance of its duties … and for the enforcement of the by-laws set out in the Third Schedule'.

THE RESPONDENT'S SUBMISSION

[22] The respondent supports the learned High Court judge's reasoning based on ss 41 and 45 of the STA, and the argument that there can be only one contribution to be decided at a general meeting of unit holders to meet all administrative expenses. The respondent does not dispute that the service charges are validly levied, although still maintaining that the respondent is not in arrears of payment since these have been regularly paid. What are in dispute are the charges described by the respondent as 'miscellaneous charges'. These miscellaneous charges, it is argued, have not been sanctioned by the general

meeting. Counsel for the respondent, Ms Elaine Yap, puts it succinctly as follows. The management corporation must at its annual general meeting budget for them. The Act has no provision to provide for residual powers. Section 43(2)(f) cannot override s 45 of the Act. On the law there must be clear and express statutory wording to impose a financial burden (*Palm Oil Research and Development Board & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265). In this context, it is argued that the learned trial judge was not wrong in referring to the persuasive authority of the *De Beers* case, since the relevant Singapore legislation is not dissimilar to the Malaysian provisions. With particular reference to an earlier settlement agreement entered into between the agent on the developer, ie EP Management Services (presently the agent of the management corporation), there was an agreement to apportion the debt to Indah Water, and the final apportionment require the consultation of the respondent. The appellant management corporation, being the successor in title to the developer, has to be held bound by this agreement and therefore cannot unilaterally impose the sewerage charges. In support of this position, the respondent relies on Australian authorities, inter alia, *The Owners SP 69352 v Vero Insurance Ltd (Home Building)* [2009] NSWCTTT 396, a decision of the Australian Consumer, Trader & Tenancy Tribunal, where the tribunal held:

> … it is both logical and a consequence of the provision of the SSMA (Strata Schemes Management Act 1996) that an owners corporation makes a claim on behalf of the owners … In relation to the common property it is the successor in title to the developer.

[23] On the sinking fund, the respondent submits what was agreed at general meeting was not a confirmation of the 15% rate, but a 'proposal' of 15% for the Council of the Management Corporation to 'review'.

[24] As for the signage charges, it is submitted that the respondent has been accorded free signage rights from the outset by the developer and the management corporation should be held by it as successor in title, quite apart from an issue of estoppel by conduct.

[25] In the course of submission, and in reply, Dato' SM Murthi for the appellant has raised an important point of principle on whether the management corporation should be seen in law as taking over the common property from the developer free of encumbrances. If accepted, this point has obvious implications on earlier-mentioned question of the settlement agreement and the alleged free signage rights. Dato' SM Murthi refers to the Australian position on this by way of s 18 of the Australian Strata Schemes (Freehold Development) Act 1973 which reads:

18 Vesting of Common Property on Registration of Strata Plan

(1) Upon registration of a strata plan any common property in that plan vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of the plan but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land immediately before registration of that plan.

THIS COURT'S EVALUATION AND DECISION

[26] We feel there are two important preliminary points that require to be made at the outset when evaluating the appeal and the submissions. First, however novel or persuasive a principle or provision of foreign law may be, it is to the terms of our own law that should form the basis of our decision. Second, where an area of the law is new and has not been fully explored by our courts, which is the position under our STA, it will be useful to draw on the decisions of other jurisdictions which have a longer experience in strata titles management. The problems will be common and cross-jurisdictional exchange of juristic solutions can be illuminating. In this light we have carefully considered the persuasive authority of the Singapore Court of Appeal in the *De Beers* decision which found favour with the learned High Court judge and formed an important basis of the High Court decision. We find the reasoning in this decision very persuasive, bearing in mind the close similarity in statutory wording. We have considered the similarities in ss 42 and 48 of the Singapore legislation. To this extent, we agree with the approach taken by the learned High Court judge and his decision that the STA merely allows the levying of one payment or contribution from unit holders approved at general meeting.

[27] We are of the view that the conclusion reached by the High Court accords with the wording of the STA, and the presumed collective intention and wisdom of Parliament. It is unnecessary to belabour the accepted position in law that courts require to interpret statutory provisions by adopting 'a construction that would promote the purpose or object underlying the Act' as a preferred construction (s 17A of the Interpretation Acts 1948 and 1967).

[28] In the Australian decisions cited before us, the term 'owners corporation' appears. This is a very apt description of a body such as the management corporation formed under the STA. The statutory formulation in s 39(1) mirrors this concept:

39 Establishment of Management Corporation.

(1) Upon the opening of a book of the strata title in respect of a subdivided building or land there shall, by the operation of this section, come into existence a management corporation consisting of all parcel proprietors including in the case of phased development, the proprietor of the provisional block or blocks.

[29] The management corporation established is by statute deemed to be a body corporate with perpetual succession and a common seal (sub-s 2A). Under sub-s (4) the management corporation 'shall elect a council which, subject to any restriction imposed or direction given at a general meeting, shall perform the management corporation's duties and conduct the corporation's business on its behalf, and may for that purpose exercise any of the management corporation's powers'. The council therefore constitutes the executive body of the management corporation here, and the council is subject to restrictions or directions of the general meeting. The basic rules for its governance are then provided in the Second Schedule of the STA, with the voting rights of a proprietor clearly spelt out:

> 15 Voting Rights of Proprietor
>
> Each proprietor who is not a co-proprietor shall have one vote on a show of hands, and on a poll shall have such number of votes as that corresponding with the number of share units or provisional share units attached to his parcel or provisional block and no proprietor shall be entitled to vote and to be elected to hold office at a General Meeting unless all contributions to the Management Fund of the corporation in respect of his parcel or provisional block have been duly paid.

[30] The rules relating to the regulation of the subdivided building are provided in the Third Schedule which consist of the by-laws, with the power granted to the management corporation to make by special resolution additional by-laws, 'not inconsistent with the by-laws set out in the Third Schedule, for regulating the control, management, administration, use and enjoyment of the subdivided building or land'. See s 44(2) of the STA. These by-laws are to bind the management corporation and the proprietors to the same extent as if they contained properly executed agreements between the management corporation and each proprietor, and between the proprietors inter se (sub-s (3) of s 44). It has been highlighted earlier how the deed of mutual covenants have been approved at general meeting as additional by-laws.

[31] The duties and powers of the management corporation are set out in s 43 of the STA. Section 43(1) makes explicit reference to a duty 'to manage and properly maintain the common property and keep it in a state of good and serviceable repair', 'to insure and keep insured the subdivided building' and 'to pay premiums on any insurance effected by it'. Further details are specified in the by-laws, specifically by-laws 3–5, reproduced below:

> 3 Common property for common benefit.
>
> The corporation shall control, manage and administer the common property for the benefit of all the proprietors:

Provided that the corporation may, by agreement with a particular proprietor, grant him exclusive use and enjoyment of part of the common property or special privileges in respect of the common property or part of it.

4 Provision of amenities or services.

The corporation may make an agreement with a particular proprietor for the provision of amenities or services by the corporation to or in respect of his parcel.

5 Functions of the corporation.

The corporation shall:

(a) maintain in a state of good and serviceable repair, fixtures and fittings (including lifts) existing on the lot and used or capable of being used in connection with the enjoyment of more than one parcel or the common property;

(b) where practicable, establish and maintain suitable lawns and gardens on the common property;

(c) maintain, repair and (where necessary) renew sewers, pipes, wires, cables and ducts existing on the lot and used or capable of being used in connection with the enjoyment of more than one parcel or the common property;

(d) on the written request of a proprietor or of a registered chargee of a parcel, the corporation should produce to the proprietor or chargee, as the case may be, (or to a person authorised in writing by the proprietor or chargee) all policies of insurance effected by the corporation together with the receipts for the last premiums paid in respect of the policies; and

(e) without delay enter in the strata roll any intended change or any other dealing notified to it pursuant to subparagraph (g) of paragraph (1) of by-law 2.

[32] A further indication of the functions of the management corporation can be discerned from the statutory provisions on sinking fund, ie s 46 of the Act. The nomenclature used by the STA is 'special account'. The special account is to be maintained for the purposes of meeting the actual and expected liabilities in relation to the following:

(a) for painting or repainting any part of the common property;

(b) for the acquisition of any movable property for use in relation with the common property;

(c) for the replacement of any fixtures or fittings in the common property;

(d) for any further expenditure … to meet the liability for maintenance or for settling any defaults in payment by a proprietor.

[33] It is obvious from a consideration of the statutory provisions that the

management corporation, although formally set up as a body corporate, operates as an entity owned by the strata title proprietors, with a variety of functions and powers carefully delineated by statute, but nonetheless concerned with the nitty-gritty of community living in a subdivided building. In this setup, the voice of the parcel owners is heard through the general meeting ultimately, and liability and representation is based on the amount of share units held by a proprietor. It is, we believe, within this context that the present dispute between the parties should be gauged.

[34] This dispute concerns charges that can be imposed, and the means by which they can be imposed within the context and confine of the statute. Within the context of the statute too, the term 'consumption-based expenditure' does not appear or is anywhere reflected by any other term. Likewise, the term 'service charges' is absent, but the STA uses the term 'contributions to the Management Fund', as appears in s 41(5)(b) and (ba), as seen earlier. Within the context of the STA again, in reading s 45 in conjunction with s 46, the expenses incurred or to be incurred by the management corporation can include not only 'administrative expenses' but also expenses related to the maintenance of the building. As clearly indicated in ss 45(1) and 43(1), the duties of the management corporation include the duty to insure and keep insured the subdivided building and to pay premiums on any insurance effected by it. The core duties and functions of the management corporation are of course concerned with the management and the proper maintenance of the common property, as seen in s 43(1)(a) where it is stated:

> (a) to manage and properly maintained the common property and keep it in a state of good and serviceable repair …

[35] In terms of statutory context, the proprietors of a subdivided building have what is termed by the statute as 'share units entitlements' (s 36) which is taken to be the 'value' of each parcel. That 'value' shall, inter alia, determine 'the proportion payable by each proprietor of the contribution levied by the management corporation pursuant to section 45 …' (s 36(c)). It is quite plain that based on this formula each proprietor has to share the administrative and maintenance expenses, inclusive of insurance premiums, which are carefully defined and delineated by the several statutory provisions mentioned earlier above. On the facts, the premiums for the insurance taken have been approved at general meeting. It has to be emphasised again that the management corporation is under a statutory duty to insure the subdivided building. The issue here is not whether proprietors do not have to contribute towards the payments for insurance premiums, but whether they can be compelled to pay their share over and above the statutory contribution to the Management Fund as established under s 45(1). In this respect, we agree with the proposition advanced by the respondent that the management corporation as a body

incorporated under statute can only levy payments which are mandated by the statute. It will be ultra vires its powers for the management corporation to levy payments which are not sanctioned by the statute. This is where a proper interpretation of s 45 of the STA becomes of fundamental importance. Section 45(1) states very clearly that the management corporation 'shall establish a management fund sufficient in the opinion of the management corporation to meet the administrative expenses as may be incurred for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance and discharging any other obligation of the management corporation'. This is a very comprehensive provision. The expenses referred to includes the payment of 'premiums of insurance' and other payments connection with 'discharging any other obligation of the management corporation'. To this extent, we agree with the submission of counsel for the respondent that in fixing the contribution to be paid by each proprietor, the management corporation must budget for it for approval at general meeting. After all, s 45(3) allows the management corporation to 'determine from time to time the amount to be raised for the purposes mentioned in subsection (1), i.e. the contribution to the Management Fund'. The issue is not whether the management corporation should not be empowered to act reasonably or to deny that it should have discretion and flexibility to manage the sub-divided building in its day-to-day running, but rather whether the charges have been properly decided by the unit holders in general meeting. We have been referred to the High Court decision in *Lai King Lung v Perbadanan Pengurusan Anjung Hijau & Anor* [2012] 7 MLJ 680; [2012] 1 CLJ 1013, which in turn quotes the Singapore High Court decision in *Paganetto v Management Corp Strata Title No 1075* [1988] 1 SLR 268, and the general principle that a management corporation should be allowed to act reasonably without undue insistence on the existence of specific by-laws to cover every practical difficulty. We agree such an approach will be unreasonable and, to quote counsel for the appellant, 'at most … highly technical and at its lowest … pedantic'. Nevertheless, the issue of proper authority to impose a levy is too important to be left to the management corporation or the council to decide as a matter of discretion. It is not quite a matter such as deciding which contractor should mow the lawn.

[36] The same reasoning applies in relation to the sinking fund. We find the statutory provision in s 46 of the STA quite clear. It states that the management corporation 'shall maintain the special account in which shall be paid such portion of the contribution to the management fund as may from time to time under paragraph (ba) of subsection (5) of section 41 by special resolution for the purposes of meeting its actual or expected liabilities' in respect of the several matters concerned with maintenance already alluded to earlier. The amount to be placed in the special account must be 'such portion of the contribution', and therefore on a proper and purposive interpretation of this provision, the management corporation cannot impose an additional levy as sinking fund

over and above the contribution to the management fund. We therefore agree with the decision of the learned trial judge on this issue.

[37] We have considered the argument by counsel for the appellant that allegedly levies can be imposed under the by-laws. By-laws however are essentially subordinate legislation. They cannot override the main provisions in ss 45 and 41 of the Act. Thus the argument that cl 4C of the deed of mutual covenants empowers the management corporation to impose 'all other charges which are properly chargeable' and that the appellant is merely claiming to recover these consumption expenses that it has paid on behalf of the unit holders, cannot stand in the face of clear statutory provisions in the main Act.

[38] It is not a case of the appellant not being allowed to itemised its billings for its administrative purposes, but rather whether these items can be justified as payable from the 'contributions' to the management fund (or 'service charges' as alternatively described by the appellant) as approved by the proprietors at general meeting.

[39] We also cannot agree with the appellant's submission that upon incorporation the management corporation assumes the common property free from all encumbrances. Our law does not have the equivalent of s 18 of the Australian Strata Schemes (Freehold Development) Act 1973. The better view surely is that the management corporation is a successor-in-title to the developer. If there had been an agreement to allow free signage use in the sale and purchase agreement, then the present management corporation should be bound by it. We find the statement of the legal position in the Australian decision in *The Owners SP 69352 v Vero Insurance Ltd (Home Building)*, persuasive and therefore should reflect the correct legal position. On the facts however, we note that the respondent has in fact been charged signage charges previously, and we feel we should be slow to disturb the trial judge's finding of fact on this issue of signage charges. We note that the respondent has even indicated in its letter dated 22 December 2010 that it is willing to pay signage charges with effect from January 2011. See p 767 of vol 2(3) of the appeal record. This is a matter of the trial judge's assessment of the evidence. We adopt the same position vis a vis the service charges claim which was allowed by the High Court. We are not satisfied that the respondent has succeeded in establishing that the learned trial judge was plainly wrong in his assessment of the evidence and his finding that the claim for the unpaid service charges should be allowed, since they remain unpaid. There is no issue on accrued interest since the point has been conceded and the learned trial judge has also not allowed interest on late payments to be claimed.

THE CONCLUSION

[40] Based on our evaluation and findings as elaborated above, both the

appeal and cross-appeal are therefore dismissed with costs. We award costs of RM30,000 for the main appeal to be paid by the appellant to the respondent. For the cross-appeal, we award costs of RM10,000 to be paid by the respondent to the appellant. The judgment of the High Court is affirmed. The deposit is to be refunded to the appellant.

Appeal and cross-appeal dismissed with costs of RM30,000 and RM10,000 respectively.

Reported by Kohila Nesan